ANNOTATED

Form 27E *Rule 44.05.5*

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S307 of 2012**

BETWEEN: **IAN WALLACE**
Appellant

and **DR ANDREW KAM**
Respondent

APPELLANT'S REPLY

PART I: Internet Publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

PART II: Reply

2. The following abbreviations are used: "AS" – appellant's amended submissions filed 1.11.12; "RS" – respondent's submissions filed 16.11.12; "AB1" or "AB2" – High Court Appeal Books filed November 2012.

3. *RS[2] & [5(a)]:* Appellant disputes the putative issue formulated by the respondent. Appellant did **not** *"accept"* the harm. It is common ground between the parties, and was found by the trial judge (at AB2:916[36] & 923[51]), and was not disputed in the NSWCA, that the appellant was not informed, advised or warned by the respondent, pre-operatively and prospectively, of the risk of harm that ultimately came home, retrospectively, of non-permanent paralysis of his legs (with technical clinical diagnosis of bilateral femoral neuropraxia of his thigh nerves), described as risk *'x'* in AS. Nor, on the appellant's case at trial and in the NSWCA, although that remains in dispute, was he informed or warned prospectively about the inherent 5% risk of catastrophic permanent paralysis (described as risk *'y'* in AS), nor of the cumulative risk (described as risk *'z'*) in AS.

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4. *RS[4]:* The concession made by the appellant at the trial was that the actual surgery had not been performed negligently. The appellant maintained his assertion at the trial, and later in the NSWCA, that the respondent had not discharged the scope and content of his prospective duty of reasonable care to inform, advise or warn the appellant. The interlocutory judgment of 24.6.10 is at AB2:886-891. The amended pleading, viz, Fourth Further Amended Statement of Claim filed 25.6.10, is at AB1:33-43.

5. *RS[5(c)], [5(d)] & [34]:* The appellant ran his case, in part, both at trial and in the NSWCA on the basis that cumulative risk (identified as *'z'* in AS) was not disclosed pre-operatively by the respondent to the appellant, as it should have been as part of the respondent's prospective duty of care to the appellant. The appellant submits that cumulative risk is a meaningful concept to patients, just as, by analogy, lawyers have to weigh up specific risks of litigation to reach and communicate an opinion about whether the overall prospects of success of a potential litigant are hopeless, reasonably arguable, strong, etc. In *Hooley v Shead* at first instance (District Court of NSW, Sydney, 11 May 1998, unreported, case no. 5784 of 1997) His Honour the late Judge Goldring held, correctly, at p 27 of his judgment in relation to surgical removal of the patient's stomach that: *"...all she was warned of was the possibility of recurrence of gastric ulcers, dumping and diarrhoea. There was no warning of the general risks associated with major abdominal surgery. Specifically, there was no warning of delayed gastric emptying, gastric atony [sic], or of gastroparesis. Ms Hooley was a trained and experienced nurse. She was as entitled as any other member of the community to receive a full warning, and specifically, the professional giving the warning must have been assured that the choice that the patient made was made after the patient was fully informed of all material risks. Ms Hooley's evidence, to which she adhered under vigorous cross-examination, was that had she been given the full and adequate warning to which she was entitled, she would not have had the treatment without obtaining a second opinion"*. This was upheld in *Shead v Hooley* [2000] NSWCA 362, special leave refused *Shead v Hooley* [2001] HCATrans 661.

6. *RS[13], [14] & [19(e)]:* The respondent is eliding the distinction between the completion and accrual of the cause of action for negligence (by harm occurring to the appellant), and the anterior interest protected by the scope and content of the respondent's duty of care to the appellant. In trespass to the person, the patient consents (and the tort is not committed) if he or she consents *"in broad terms of the nature of the procedure to be performed"*, in this instance, lower back surgery, regardless of whether or not the patient was prospectively informed of specific inherent risks – see *Rogers v Whitaker* (1992) 175 CLR 479 at p 490.7 (per Mason CJ, Brennan, Dawson, Toohey & McHugh JJ). The doctor's duty to inform, in negligence, protects the patient's interest in decision-making as an autonomous being. In addition to the passages cited at AS[37], see *Rogers* at pp 486.8 & 488.9-490.1 (approving Lord Scarman's dissenting view in *Sidaway v Governors of Bethlehem Hospital* [1995] AC 871 (HL) at p 876) that the interest protected by the doctor's duty to warn *"...arises from the patient's right to decide for himself or herself whether or not to submit to the medical treatment proposed" (Rogers* p 486.6).

7. *RS[12], [18], [19(c)], 19(f), [20]:* The respondent unduly restricts *"relevant"* considerations in patient decision-making. This was broad at common law, and is reinforced and strengthened by the notion of *"all relevant circumstances"* in s 5D(3) of the CLA. A wide-range of considerations may be relevant to a reasonably informed decision, as in *Medlin v State Government Insurance Commission* [1995] HCA 5, (1995) 182 CLR 1 where the professor's voluntary decision to resign from his university post due to his pain and reduced enjoyment of the work was 'caused' by the motor vehicle accident and was compensable of economic loss (diminished earning capacity), even though he was still able to perform his mandatory academic duties satisfactorily and was not obliged to retire. In *Kenny & Good v MGICA* [1999] HCA 25, (1999) 199 CLR 413, Gaudron J explained at 425[19]-426: *"One of the problems most frequently encountered in the area of causation is imprecision of language [citations omitted]. When a person claims to have taken, or refrained from taking, a particular course of action in reliance upon another's representation, the critical question, assuming the representation is one that might reasonably be relied upon, is whether, but for that representation, he or she would have taken that action. In that context, 'but for' does not signify a sine qua non or causative factor which, although necessary, is not sufficient to produce the result in question. Rather, it signifies the decisive consideration or one of the decisive considerations for taking the course of action in question. It was in the former sense that the 'but for' test was rejected as the exclusive test of causation in March v Stramare [(1991) 171 CLR 506 at 516, per Mason CJ; at 523 per Deane J]. In the sense of asking whether a representation is a decisive consideration, 'but for' is always the test of reliance."* Material contribution suffices: *Strong v Woolworths* [2012] HCA 5, (2012) 86 ALJR 267 at [18]-[20]. In the present case, the course of action was the appellant's decision to proceed with the respondent's proposed surgery, in reliance on incomplete information from the respondent, and the surgery entailed an indivisible package of specific and cumulative inherent material risks of which the appellant was unaware, and which materially contributed to his decision-making.

8. *RS [19]& [35]-[37]:* The respondent analyses the examples at [19] in terms of factual causation (s 5D(1)(a) CLA). The appellant submits that they are more readily explained in terms of scope of liability (s 5D(1)(b)), for example, in Lord Hoffmann's mountaineering example, the risk of avalanche falls outside the risk that was within the scope of the doctor's duty of care to protect and facilitate informed decision-making. S 5D reflects the analytical framework set out in the American Law Institute's **Restatement (Third) of Torts: Liability for Physical and Emotional Harm**, Chapter 6 ("Scope of Liability (Proximate Cause"), current as at August 2012; and Prof Stapleton adopts the scope of liability explanation in her recent analysis: "Reflections on Common Sense Causation in Australia", Chapter 14 (pp 331-365 especially pp 353-356 ('the failure to warn cases')) in Degeling, Edelman & Goudkamp (eds), **Torts in Commercial Law** (Law Book Co, 2011). The American Law Institute formulates the main scope of liability principle at §29 of Chapter 6 as being: *"An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious".* That is assessed retrospectively with regard to the scope and content of the prospective duty. The Australian **Review of the Law of Negligence Final Report** ('Ipp Report', Canberra, ACT, September 2002) regarded the scope of

the risk as a factor to be taken into account (page 119, par 7.50) but identified other considerations, inter alia, to be evaluated as being: *"(i) whether (and why) responsibility for the harm should be imposed on the negligent party; and (ii) whether (and why) the harm should be left to lie where it fell"* (page 118). This is reflected in s 5D(4) of the CLA. The appellant contends that the respondent's failure to inform and warn of risks *'x', 'y' and 'z'* here was both factually causative and within the scope of liability and is *"appropriate"* (s 5D(1)(b)). The risks were non-segmental as part of an overall proposed operation. The appellant submits in answer to [35]-[37] that the scope of liability should reinforce the scope and content of the duty of care to facilitate and protect informed and autonomous patient decision-making.

9. *RS[28] & [32]:* The appellant submits that the Court should reject such a construction as it is not mandated by the text, and would allow retrospective outcomes to outweigh and drain the prospective scope and content of the duty of care. Harm should not be narrowly confined, as risks may be stated with different levels of generality (see AS [40]; and see *Hughes v Lord Advocate* [1963] UKHL 1, [1963] AC 837 explained by Beazley JA in her Honour's dissenting judgment at AB2:1007[137]-1008[141] which the appellant adopts.) The appellant is not running the issues together, but giving them proper context in the framework of the CLA.

10. *RS[38]:* The appellant's claim is not "opportunistic". It fits within the rationale for the scope and content of the duty of care. S 5D(2) is applicable in the alternative.

Dated 30 November 2012

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